MALAYAN TRADING CO. and another vs. LEE PAK YIN

[Appellate Civil Jurisdiction (Gordon-Smith, J.A.)

October 19, 1940]

Rule Committee (Supreme Court) Enactment (Cap. 13), 1932 Rule No. 4—Taxation of costs—Certificate for two counsel—Fees of junior counsel—Solicitors' attendance in Court.

At the trial the first plaintiffs were represented by two counsel, the junior of whom was a member of the firm of solicitors for the plaintiffs. Another member of that firm attended the trial as instructing solicitor. By order of Court on the trial the defendants were ordered to pay the costs of the first plaintiffs and a certificate for two counsel was given. On taxation, the Assistant Registrar allowed the following items under 1932 Rule No. 4:

Item	239.	Instructions for brief, attending witnesses, etc.
„	253.	Drawing instructions to counsel.
„	244 & 246.	Attendances on counsel and preparing brief.
„	251.	Solicitor's attendance in Court.
also		A fee to junior counsel on the basis of 2/3rds of the fee on brief to leading counsel.

The defendants appealed.

Held, that the Rules promulgated in the Colony for the guidance of taxing masters in regard to counsel's fees should be observed here.

Solicitor's charges for briefing counsel are only allowable in respect of leading counsel and not in respect of the second counsel, who may be allowed a reasonable getting-up fee.

The comprehensive getting-up fee under Item 86 is only intended as a fee payable to a member of the instructing firm of solicitors who appears in Court as counsel in the case and in which a formal brief is neither prepared nor handed to counsel as such.

It is nowhere laid down that the fee on brief to junior counsel should be 2/3rds of the fee for leading counsel and this custom which has been imported from England is wrong in principle where the junior counsel is a member of the firm of the instructing solicitors. He is allowed a getting-up fee and the ordinary fees for attending Court and conducting the suit.

No fee is allowed to any other member of the firm who may attend the trial as solicitor.

Case referred to:—

(1) *Muruggappa Chettiar v. Seenivasagam* (1940) M.L.J. 108; (1939) F.M.S.L.R. 121.

APPEAL AGAINST REGISTRAR'S ORDER.

H. T. Ong for plaintiffs (respondents).

R. Ramani and Chin Swee Onn for defendants (appellants).

Gordon-Smith, J.A.—This was an appeal by Messrs. Chin Swee Onn & Co., solicitors for the defendant, against the decision of the Registrar upon the taxation of the bill of costs of the first plaintiff's solicitors, Messrs. Lim & Ong.

The allocatur in respect of this bill is dated the 6th July, 1940, and is for $7,681.50.

On the hearing of the appeal before me, Mr. H. T. Ong appeared as respondent and Mr. Ramani and Mr. Chin Swee Onn for the appellants. The Registrar was also in attendance.

As the appeal raises questions of counsels' fees and "getting-up" fees, it is desirable to set out the appearances for the first plaintiff at the trial.

For the plaintiffs, Mr. Seenivasagan and Mr. H. T. Ong appeared as counsel having been instructed by Messrs. Lim & Ong of which firm Mr. H. T. Ong is a partner, and Mr. Lim, another partner, attended Court on the trial as the instructing solicitor. No question arises as to the costs of the second plaintiff but by order of Court of the 20th May, 1940, the defendants, were ordered to pay the costs of the first plaintiff as between party and party on the higher scale and a certificate for two counsel for the first plaintiff was given.

The appeal was in respect of instructions for brief on which $1,783.33 had been claimed (but only $1,000 allowed) and subsequent items which altogether totalled $2,626.23. Interwoven with the objection to this amount were objections lodged in respect of fees disbursed to senior counsel ($3,000) and junior counsel ($2,000).

For convenience of reference I set out, but in an abridged form, the items of the bill that are objected to and which are relevant to the points to be considered.

Pages 5 and 6:

Item 239. Headed "Instructions for brief", attending witnesses, inspecting accounts, etc., and getting-up case generally: For witnesses' proofs the amounts total $270.83. For inspecting accounts $12.50 and again for examining accounts, for preparing brief and getting-up case, $1,500, totalling $1,783.33 and for all of which the Registrar allowed a comprehensive fee of $1,000.

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Item 253. Drawing instructions to counsel and (again) preparing brief $120.50 (at 50 cents per folio).

Item 244. Attending counsel with brief $20.

Item 246. Attending counsel on consultation $75 but $25 was allowed.

Item 246. Attending counsel going through evidence $62.50 but $25 was allowed.

Then follow under item 251, nine charges of $60 each for attending Court on hearing and on the 10th day $15 to hear judgment.

Excluding this last item of $15, the above-mentioned items total $2,626.33, to which total the appellants objected.

Then, under the heading "Disbursements" come items for counsel, namely, fee on brief for senior counsel $3,000 and refreshers $1,500, on which the Registrar allowed a total of $3,000.

Fee on brief and refreshers to second counsel which the Registrar allowed at $2,000, being 2/3rds of the fee allowed senior counsel.

Summarizing the above, the position in connection with the actual briefing of counsel and preparing for the trial and at the trial, which, incidentally lasted nine days plus attending to hear judgment on a 10th day, is as follows:—

For preparing for the actual trial a "getting-up" fee of $1,783.33 was charged but was allowed at $1,000.

For drawing brief and various attendances on counsel the solicitors have charged $303 but were allowed $215.50.

They have also charged and been allowed for attending trial as solicitors $540.

These items total $1,355 to which must be added the 25 per cent. addition making it a figure of $1,692.75 To this must be added the $2,000 fee allowed to junior counsel, making gross profit costs to the firm in connection with the actual trial only and apart from the other ordinary costs of suit, of a sum of $3,692.75.

There was also the fee to senior counsel which brings the total costs of preparing for and at trial to $6,692.75.

In a taxation appeal earlier this year, reported in the Malayan Law Journal *Muruggappa Chettiar v. Seenivasagam*[1], I stated that the Rules promulgated in the Colony for the guidance of taxing masters in regard to counsel's fees, should be observed here. They are to be found (as regards the Colony) in the M.L.J. Vol. 6 at page LXIII, but it will be convenient to quote here (with the transposed references to the Federated Malay States items) No. iv of what I will call, these Instructional Rules:—

"(iv) Where the solicitor briefs counsel who is not connected with his firm to appear as leading counsel and the solicitor appears as junior counsel, and a certificate for two counsel has been given, on taxation a reasonable fee on brief and refreshers shall be allowed for the leading counsel and reasonable sum shall be allowed for the junior counsel under Items 86, 87 or 88 as the case requires and also the usual charges allowed to counsel for attendances at Court and there shall be allowed in addition the reasonable charges of the solicitor for preparing brief for the leading counsel and for attendances on and conferences with him."

This exactly covers the position in this case before me and I would observe that the expression "the solicitor" includes a firm and every member thereof. Analysing this rule as regards junior counsel and the solicitor it appears:—

(*a*) a reasonable sum is to be allowed to junior counsel under Items 86, 87 or 88 as the case requires (these items constitute what is known locally as "the getting-up fee");

(*b*) usual charges are to be allowed to counsel for attending at Court;

(*c*) instructions for and preparing brief for and attending conferences with the leading counsel are also allowable.

There is a further and rather relevant note to Item 258 which reads:—

"The fees referred to in Items 237 to 258 shall only be allowed where the counsel briefed is not in the same firm as the advocate and solicitor for the party on whose behalf he is briefed".

These items 237 to 258 relate to instructions to and attending counsel and drawing brief.

Prima facie, therefore, leading counsel gets his fee on brief. This was allowed at $3,000 but such sum included refreshers to such leading counsel.

Similarly, $2,000 was allowed to junior counsel on the basis of 2/3rds of the fee on brief to leading counsel, presumably in addition to a "getting-up" fee which was allowed at $1,000.

One of the questions, therefore, for decision is whether this $2,000 is reasonable, having regard to all the circumstances.

But this instructional rule says that "usual charges" are to be allowed for attending Court, presumably to junior counsel, but apparently the

solicitor's charges for briefing counsel are only allowable in respect of leading counsel and not in respect of the second counsel but who may be allowed a reasonable "getting-up" fee.

It is, I think, unnecessary to quote any authorities in regard to the powers, and I would add, assumed competency, of a Judge sitting in appeal on a taxation matter, as it is well settled that in regard both to *quantum* and to the exercise of a discretion vested in a taxing master, it is only when such discretion has been exercised on a wrong principle or the *quantum* allowed is obviously wrong that a Judge will interfere. In nearly all the items quoted, a discretion has been specifically vested in the Registrar, and sub-rule 58 (i) of the Rule No. 4 of 1932 specifically lays down how this discretion is to be exercised.

The difficulty I am in is that, as far as my information goes, there are no settled principles here in regard to the manner in which a Registrar shall tax a bill of costs when two counsel are certified for by the Court and the junior counsel is a member of the firm of instructing solicitors and such solicitors also charge a general fee in their bill as a getting-up fee under Item 86. The Instructional Rule No. iv is not free from ambiguity.

The difficulty arises, of course, from the fact that in Malaya the two professions are fused and in actual technical fact there are no counsel here at all, although the Rules and Schedule speak of counsel. There are only advocates and solicitors although admittedly some practitioners have, so to speak, specialized in advocacy and their services as counsel are eagerly sought after.

My own view is that the comprehensive getting-up fee under Item 86 was only intended as a fee payable to a member of the instructing firm of solicitors who appears in Court as counsel in the case and in which a formal brief is neither prepared nor handed to counsel as such. Alternatively, the solicitor as such, and not as counsel, can charge item by item for work done in preparing for trial (*see* the succeeding Item No. 87) and this would then have no relation to counsel's fees on brief or refreshers.

I would also draw attention to the fact that until the item of the 20th May, 1940, where $15 for attending to hear judgment was allowed to each counsel there is no distinction drawn as regards attendances on or briefs for the two counsel engaged. It would appear as if, after judgment and having been successful in obtaining a certificate for two counsel, it was then decided that two counsel should be taken as having been briefed by the solicitors acting in the matter, although one of them was himself a member of such firm.

In this respect I would draw attention to the fact that nowhere in the rules, nor in the schedule, is anything laid down to the effect that the fee on brief to junior counsel shall be 2/3rds of that allowed to leading counsel. The amount of fees to counsel is in the discretion of the Registrar and although one knows that the custom of allowing junior counsel a fee of 2/3rds of the fee presumably marked on leading counsel's brief, has been imported from England yet it is extremely doubtful, in my opinion, whether such custom should apply to a junior counsel who is a member of the firm of the instructing solicitors. For one reason I doubt if a formal brief is ever prepared for junior counsel or marked with his 2/3rds fee. Similarly, so it seems to me, a certificate for two counsel may be given by Judges without a full realization of the extreme complications that ensue for a taxing master on the subsequent taxation, in the absence of settled principles upon which to tax the successful solicitors' bill.

What, therefore, should be the effect and meaning of a certificate for two counsel? What is meant is, I think, that in the opinion of the Court the case is of sufficient importance or complex nature as to have justified the employment of leading counsel. What its effect is, is a matter for my decision in this appeal.

To interpret No. iv of the Instructional Rules it is necessary to have regard to what is contained in the preceding and subsequent rules and also to appreciate what are the "usual charges" which, so I understand, are allowed in an ordinary case. Taking the ordinary case of a firm, a member of which has conducted successful litigation on behalf of a client and he has appeared in Court himself, the position is as follows:

No formal brief is prepared, nor have there been formal instructions to or attendances on counsel. Apart from the ordinary charges for conducting the suit, prior to trial he is allowed a getting-up fee under Item 86 the amount of which is in the discretion of the taxing master and depends entirely on the complex nature of the suit and the work done.

He is also allowed, so I understand, a fee of $140 for each and every day he is attending the trial.

No fee is allowed to any other member of the firm who may attend the trial as solicitor. This, so I understand, is the practice. No certificate for counsel is required. But, if it is desired to bring in another and outside advocate as leading counsel, then a certificate for two counsel is required before brief fees, etc., will be allowed to or in respect of such leading counsel and the member of the firm appearing as junior counsel will be allowed "the usual charges".

This is how I interpret Instructional Rule iv and is the principle on which the bill should have been drawn and have been taxed. I think that the fee of 2/3rds to junior counsel is wrong in principle, where such so-called junior counsel is a member of the firm of advocates and solicitors briefing leading counsel.

It seems to me to be unnecessary and superfluous to send the bill back to the Registrar to review his taxation on the basis I have indicated and I can, on this appeal, make the necessary order myself.

I confirm the allowance of $1,000 by the Registrar under the item headed 239 (but which should have been Item 86) and subsequent items thereunder, as a "getting-up" fee.

I confirm the allowances under Items 253, 244 and 246, but with some hesitation, as to the amounts allowed.

I delete, or tax off, all items under Item No. 251 and I substitute an allowance of $1,260 for the $2,000 for brief and refreshers to junior counsel. This is on the basis of $140 per day of nine days and he has already been allowed $15 for attending to hear judgment.

I confirm the fee of $3,000 allowed in respect of leading counsel.

The result is a diminution in the amount of the bill of $1,280 and therefore the allocatur to be issued will be for $6,401.50.

Under the circumstances, I make no order as to the costs of this appeal.

Order accordingly.

SARBAN SINGH vs. P. P.

[Appellate Criminal Jurisdiction (Poyser, C.J.)

November 15, 1940]

Minor Offences Enactment (Cap. 46), section 28 (i)—Offensive weapon—Parang.

The appellant was charged with and convicted of the following offence: "That you....did go armed with an offensive weapon, to wit, a long parang, contrary to the provisions of section 28 (i), Cap. 46."

Held, that a parang cannot be regarded as an offensive weapon within the meaning of the section. To hold otherwise would render liable to punishment most of the agriculturists in Malaya. An offensive weapon in the section means an instrument primarily intended for offence, not an instrument primarily intended for other purposes.

A. K. Sen for appellant.

T. T. Russell, Deputy Public Prosecutor, for respondent.

Poyser, C.J.—The appellant was charged with the following offence:

"That you at 8th July, 1940, at 8.35 p.m. at 12th mile, Sungei Buloh, did go armed with an offensive weapon, to wit, a long parang, contrary to the provisions of section 28 (i) Cap. 46 and thereby committed an offence under that section under that Enactment."

A sub-inspector and a police constable gave evidence for the prosecution. It was to the following effect; that in consequence of information received they went to Sungei Buloh, and there saw the appellant on the foot-path in front of a shop holding a parang.

The appellant gave evidence, and admitted being in possession of the parang, and stated that he had borrowed it from one Periasamy in order to put up a fence round his house, and he had no intention to injure anyone with it.

Chapter 46 does not define an offensive weapon although it does lay down that certain arms and weapons are not to be deemed offensive weapons. I do not think a parang can be regarded as an offensive weapon within the meaning of this section. To hold otherwise would render liable to punishment most of the agriculturists in Malaya. No doubt a parang can be used as an offensive weapon, so, for that matter, can a rubber tapper's knife, and a number of other agricultural and domestic implements.

An offensive weapon in the section means, in my opinion, an instrument primarily intended for offence, not an instrument primarily intended for other purposes.

The appeal is accordingly allowed and the conviction set aside. The fine of $15 which has been paid will be refunded to the appellant.

Appeal allowed. Conviction set aside.